

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 299 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

ESTATE OF AMBALAL SARABHAI
Versus
COMMISSIONER OF INCOME TAX

Appearance:

MR D.A. MEHTA, MR. R.K. PATEL AND MR B.D. KARIA
for MR KC PATEL for Petitioner
MR AKIL QURESHI with MR MANISH R BHATT for Resp. No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE A.R.DAVE
Date of decision: 04/07/2000

ORAL JUDGEMENT (Per R.K.Abichandani, J.)

The Income Tax Appellate Tribunal, Ahmedabad Bench "A" has referred the following questions in respect of the assessment years 1972-73 and 1973-74 for the consideration of the High Court under Section 256(1) of the Income Tax Act, from the Tribunal's order dated 18.8.1981 and 20.8.1983, the later being question on the ground which was raised but through oversight not decided in the earlier order by the Tribunal.

At the instance of the Revenue:

Assessment Year 1972-73

Ref.Appln.No. 970/Ahd/1981:

- (1) "Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in coming to the conclusion that the reopening of the assessment for the assessment year 1972-73 under Section 147(b) was not legal?"

At the instance of the Assessee:

Assessment Year 1973-74

Ref.Appln.No. 961/Ahd/1981:

- (1) "Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the ITO was justified in reopening the assessment on the basis of the information received from the Revenue Audit Party?"
- (2) "Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the information given by the Revenue Audit Party regarding the ratio laid down in the case of Sir Curimbhoy Ibrahim Beronetcy Trust Vs. CIT (48 ITR 507) constituted "information" within the meaning of Section 147(b) of the Income Tax Act, 1961?"

In Ref.Appln.No. 709/Ahd/1983:

- (1) " Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the action of the ITO of assessing the applicant as "owner" in respect of income from house property in question was justified when the applicant as the Executors were holding the property in question merely as trustees for and on behalf of the beneficiaries and therefore the property income was rightly assessed in the original assessment in the hands of Smt.

Saraladevi Sarabhai, the beneficial owner?"

(2) "Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that applicant was not entitled to deduction under Section 23(2) of self occupancy allowance when Tribunal itself having held that the applicant was liable to be assessed in respect of income from house property in question as the owner?"

2. The assesseees are the executors and trustees of the estate of late Shri Ambalal Sarabhai. In the original assessment order, income from the house property known as "Main bungalow" in Retreat Compound at Ahmedabad was not taxed in the hands of the said assessee for the years in question on the ground that the income from the said house property was included in the total income of Smt. Saraladevi widow of Shri Ambalal Sarabhai, to whom right to reside free of rent in the property for her life was given under the will by Shri Ambalal Sarabhai and that she had exercised that right with effect from 1.4.1971.

3. For the assessment year 1972-73, the Income Tax Officer reopened the assessment under Section 147(b) of the said Act, on the ground that the income from the said property was required to be taxed in the hands of the "owner" of the house property i.e. the executors and trustees of the estate of late Shri Ambalal Sarabhai. The original assessment was completed on 31.3.1975 for the said assessment year 1972-73. In the said order which is at Annexure "I" in the paper-book, it is recorded that the assessee had filed a revised return on 9.9.1973, excluding the income from the two properties situate in the Retreat Compound, as, the income from the main bungalow was included in the total income of Smt. Saraladevi Sarabhai to whom the right to reside free of rent was given under the will. In the revised assessment made under Section 147(b) of the Act, the Income Tax Officer by his order dated 19.3.1978 held that the assessee's Estate being the owner of the property, even if right to reside was given to the widow, was liable to be assessed for the property income as the real owner of the house property, in view of the provisions of Section 22 of the said Act. The ITO relied upon the decision of the Bombay High Court in Sir Curribhoy Ibrahim Baronetcy Trust Vs. C.I.T, reported in 48 ITR 507 for the proposition that income from the property can be taxed in the hands of the owner. He was also impressed by the

fact that the assessee had not produced any written option exercised by Smt. Saraladevi Sarabhai, and presumed that no such option was exercised.

3.1 As regards the Assessment Year 1973-74, the Income Tax Officer had reopened the assessment under Section 147(b) of the Act, on the ground that income from the property can be taxed in the hands of the owner, as per the ratio laid down in the case of Sir Currimbhoy Ibrahim Baronetcy Trust (supra) and that the liability to tax arises from the fact that the assessee was the owner of the property being the executors and trustees of the estate of late Shri Ambalal Sarabhai. It was also noted that this mistake was pointed out by the Revenue audit party of the Auditor General. On the basis of this information, according to the ITO, he had reason to believe that the income of the assessee was underassessed.

3.2 The return of the income for the assessment year 1973-74 was filed on 14th August, 1973. By the assessment order dated 22.11.1975, the ITO held that in Indian law beneficial ownership is unknown and that there is, but one owner namely the legal owner, both in respect of vendor and vendee as well as trustee and cestui que trust, and therefore the house property was assessable in the hands of the legal owner i.e. executors and trustees of the estate of late Shri Ambalal Sarabhai as the "owner" of the building and appurtenant thereto, within the meaning of Section 22 of the said Act.

3.3 The assessee challenged the orders of the assessment before the Appellate Assistant Commissioner, who by his order dated 25.3.1980 came to the conclusion that reopening of the assessment for the two years, cannot be held to be illegal and that if on becoming aware of the mistake of law committed in the original assessment, the Income Tax Officer considers the facts of the case and forms his own reason to believe that the taxable income had escaped assessment, then he can open reassessment under Section 147(b) of the said Act. The A.A.C also held that the income from the house property had to be assessed in the hands of the assessee executors as "owner" of the property.

3.4 The assessee approached the Tribunal against the order of the Appellate Assistant Commissioner. The Tribunal took note of the fact that in the reasons which were recorded for reopening the assessment for the assessment year 1972-73, the ITO had only mentioned that he had information that the income from property was to

be taxed in the hands of the owner, while, for the year 1973-74, in the reasons recorded, there was a specific mention of the ratio of the decision in Sir Currimbhoy Ibrahim Baronetcy Trust's case and to the fact that there was an audit note pointing out the mistake. The Tribunal found that on perusal of the reasons recorded by the Income Tax Officer for reopening the assessment for the A.Y 1972-73, it appeared that the decision of the Supreme Court in Kalyanji Mavji & Co. Vs. CIT, reported in 102 ITR 287 was treated as information, on the basis of which the ITO had reopened the assessment. It was held that the ITO had applied the law laid down in the case of Kalyanji Mavji & Co. (supra) to the facts of the case, which proposition of law he knew even at the time of the original assessment and therefore, he had no information on the basis of which he could have reopened the assessment for the year 1972-73. The reopening of assessment for the assessment year 1972-73 was therefore, held to be illegal.

3.5 As regards assessment year 1973-74, the Tribunal was of the view that in the reasons recorded by the Income Tax Officer for reopening the assessment, decision in Sir Currimbhoy's case (supra) was mentioned and the audit note which had pointed out the mistake of not considering the law laid down in that case was also referred to. The Tribunal therefore held that the information given by the Revenue audit party of the ratio in Sir Currimbhoy Ebrahim Baronetcy Trust's case constitute information on the basis of which the ITO was justified in reopening the assessment under Section 147(b) for the assessment year 1973-74. The Tribunal therefore, allowed the assessee's appeal for the year 1972-73 and dismissed for the assessment year 1973-74, by its order dated 18th August, 1981. In that order, the Tribunal had omitted to consider the question on merits in context of the provisions of Section 22 of the said Act in respect of the A.Y 1973-74 for which it upheld the reopening. The assessee therefore, made an application being Misc. Application No. 112/1981 in respect of the assessment year 1973-74, pointing out the grounds raised by the assessee which were not considered by the Tribunal in its earlier order. By its order dated 20th August, 1983, the Tribunal partly allowed the appeal by holding that the AAC was right in holding that the assessee was the owner of the property in question within the meaning of Section 22 of the said Act and that it was not material that Smt. Saraladevi, widow of the testator was entitled to reside in the property for life. As regards the claim of the assessee under Section 23(2) of the said Act, the Tribunal held that it was not allowable because

as per that provision, it was necessary that the property should be in the occupation of the owner for residence. On this count also, the Tribunal confirmed the order of the AAC. On other aspects, the findings of the Tribunal are not material, as they do not relate to any of the questions which are referred to us.

4. As regards the assessment year 1972-73, on going through the reasons recorded by the ITO, it appears that there was a reference made to Kalyanji Mavji's case and the reasons do not disclose whether the ITO had in mind Sir Currimbhoy Ebrahim Baronetcy Trust's case. The decision in Kalyanji Mavji's case laid down that the word "information" in Section 34(1)(b) of the Act of 1922 was of the widest amplitude and comprehended a variety of factors. Information may come from external sources or even from the materials already on record or may be derived from the discovery of new and important matter or fresh facts. Listing the categories of cases to which Section 34(1)(b) of the Act of 1922 would apply, the Supreme Court laid down that where the information was as to the true and correct state of the law derived from relevant judicial decisions that would constitute an information. In the reasons which were recorded for the assessment year 1972-73, there was no mention of any such information on the basis of any decision of the Court. Reference to Kalyanji Mavji's case did not constitute any such information because Kalyanji Mavji's case was not in context of Section 9 of the Act of 1922 and the aspect of ownership of the property was not an issue in Kalyanji Mavji's case. That was a case which laid down the law as to what constituted "information". Therefore, the Tribunal was right in holding that the reasons did not disclose that the ITO had reason to believe that income had escaped assessment, on the basis of any information. The ITO referred to information from outside source, which is not disclosed in the reasons recorded. We therefore hold that the Tribunal was right in law in coming to the conclusion that the reopening of the assessment for the assessment year 1972-73 under Section 147(b) was not legal and the question No.1 for the Assessment Year 1972-73 is accordingly answered in favour of the assessee and against the Revenue.

5. As regards the assessment year 1973-74, on going through the reasons it is clear to us that the ITO did refer to the information, which he obtained as regards the ratio of the decision of Sir Currimbhoy Ebrahim Baronetcy Trust's case, which is specifically mentioned in the reasons recorded. He also referred to the fact that the Revenue audit party of the Auditor General had

pointed out the mistake. It is clear that it was not on the strength of any suggested interpretation of the audit party that the ITO had acted. He had acted on noticing the ratio in Sir Currimbhoy Ebrahim Baronetcy Trust's case, which was rendered in context of Section 9(1)(iv) of the Indian Income Tax Act, 1922. It was held therein that income from property was an artificially defined income and that the liability arose from the fact that the assessee was the owner of the property and the liability did not depend on the power of the owner to let the property and also it did not depend upon the capacity of the owner to receive the bonafide annual value. The facts before the High Court were, that the trustees of a Baronetcy Trust created by a statute were the owners of certain properties. Under the statute, the incumbent for the time being to the office of Baronetcy was entitled to reside free of rent in two flats and a bungalow which formed part of the trust properties. In 1949, the then Baronet was declared an evacuee and the Custodian of Evacuee Property passed an order declaring the flats and the bungalow to be evacuee property and the right of residence of the Baronet free of rent to vest in him. The question was whether the trustees could thereafter be assessed to tax on the annual rental value of the flats and the bungalow under Section 9 of the Indian Income-tax Act of 1922. The High Court held that as the trustees were the owners of the flats and the bungalow, their annual value was liable to be assessed in the hands of the trustees under Section 9 of the Act. Neither the vesting of the interest of the Baronet in the Custodian nor the inability of the trustees to realise rent from the flats and the bungalow affected this position. It was held that the fact that the trustees were not in a position to obtain any rent from the properties was not material since the liability of the trustees as owners of the property did not depend upon their power to let the properties nor on their capacity to receive income therefrom. As noted above, the Supreme Court in Kalyanji Mavji's case had laid down that where the information was as to the true and correct state of the law derived from relevant judicial decisions, that would constitute an information for the purpose of invoking the provisions of Section 34(1)(b) of the Act of 1922. In our view therefore, the Tribunal was right in holding that the ITO was justified in reopening the assessment for the A.Y 1973-74 on the basis of the information received from the Revenue audit party and on the basis of the ratio of the decision of the Bombay High Court in Sir Currimbhoy Ebrahim Baronetcy Trust's case. The above questions Nos. 1 and 2 referred at the instance of the assessee in this regard are therefore, answered in the affirmative in

favour of the Revenue and against the assessee.

6. We now take up the question raised by the assessee contending that reassessment of the income from the house property in the hands of the assessee could not have been done in view of the beneficial ownership having vested under the will in Smt. Saraladevi Sarabhai, in whose hands, according to the assessee, the income from the house property was already assessed. The provision of Section 22, which falls for our consideration reads as under:-

22. "Income from house property.-- The annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income-tax, shall be chargeable to income-tax under the head "Income from house property".

7. It will be seen from the above provision that the annual value of house property i.e. the buildings or lands appurtenant thereto of which the assessee is the owner, is chargeable to income-tax under the head "income from house property". Section 23 lays down how such annual value of the house property is to be determined. The cases where the assessee is both the legal and beneficial owner do not pose any problem. The question is whether the concept of ownership of house property in Section 22 accommodates the dichotomy of a legal owner and a beneficial owner in context of the fact that it is the annual value of such property which is made chargeable to income-tax. The statute has adopted the formula of "annual letting value" of such property to work out the notional income from it. Under the amended Section 23(1) (after the Assessment Year 1976-77), where the annual rent exceeds the sum for which the property might reasonably be expected to let from year to year, the annual rent is deemed to be the annual value of the property.

8. In R.B. Jodha Mal Kuthiala Vs. CIT, reported in 82 ITR 570, the Hon'ble Supreme Court construed the provisions of Section 9 of the Act of 1922, in context of the question whether the assessee whose property vested in the custodian of evacuee properties by virtue of Section 6(1) of the Pakistan (Administration of Evacuee Property) Ordinance, 1949 as evacuee property, continued

to be the owner of the property for the purpose of computation of income under Section 9 of the Act of 1922. The Supreme Court held that such an assessee cannot be assessed under the said head of, 'income from house property' since the word "owner" must mean in the context of Section 9, a person who can exercise rights of the owner and is entitled to the income from the property. It was held that a property cannot be owned by two persons each one having independent and exclusive right over it. Therefore, for the purpose of Section 9 of the Act of 1922, the owner must be that person who can exercise the rights of the owner not on behalf of the owner, but in his own right. The Supreme Court observed that like all other laws, even the tax laws are to be interpreted reasonably and in consonance with justice.

8.1 In CIT Vs. Podar Cement Works, reported in 226 ITR 625, while construing the provisions of Section 22 of the said Act, and considering the effect of the decision in R.B. Jodha Mal Kuthiala's case (supra) the Supreme Court held that the observations in R.B. Jodha Mal Kuthiala's case clearly fixed the liability on the person who receives or is entitled to receive the income from the property in his own right. It was in terms held that in the context of Section 22 of the said Act, having regard to the ground realities and further having regard to the object of the Income-tax Act, namely - "to tax the income", a person who is entitled to receive income from the property in his own right is the owner contemplated by the said provision. This view was taken after noticing that the settled position under the common law as to the meaning of "owner" was that owner means a person who has got valid title legally conveyed to him after complying with the requirements of law such as the Transfer of Property Act, Registration Act etc.

9. The attributes of ownership of property are an aggregate of rights, powers, liberties or privileges, conveniently called bundle of rights. The important rights are the right to have and to get possession (jus possidendi); the right to prevent interference by others with his exercising the attributes of ownership and to exclude others from control use or enjoyment of the object owned (jus prohibendi or excludendi). The powers consist of the power to alienate the object or of granting to others rights or liberties or privileges with respect to it (jus disponendi); and the liberties are of using the object according to one's will (jus utendi), the liberty of enjoying the fruits and avails of the object owned (jus fruendi), the liberty of changing its form or even destroying it (jus abutendi). See

`Jurisprudence' by Roscoe Pound (1959 End.) Vol. V, pt.8 at page 128).

9.1 That which a man owns is in all cases a right and when one speaks of ownership of a particular object it is a convenient expression for the kind of rights owned in the object. One who held such interest for life, owned that particular estate for life. Such life interests in house property i.e. Habitatio, which means use of a house for life where the house could be let but not alienated by sale or gift, would still be an important right owned in the immovable property of its exclusive use and to its usufruct, to the exclusion of others till life.

10. Who is then the "owner" of house property in a case like the present one where the testator has bequeathed under the Codicil dated 15.2.1963 in favour of his widow right to reside and occupy and enjoy free from payment of rent or compensation during her life time the premises in question and to receive rents and profits thereof as she wishes and subject to this right the "trustees" under the will were entitled to sell the property in accordance with paragraph 9 of the will? According to the Revenue, the executors and trustees of the will being the legal owners of the property, its annual value was to be treated as income in their hands while according to the executors and trustees of the estate, since the widow was given the right to enjoy the house property for her life time to the exclusion of all others, she was the beneficent owner thereof in whose hands the property was rightly assessed.

11. The executor gets a representative title as provided in Section 211 of the Indian Succession Act, 1925 and all the property of the deceased person vests in him as such legal representative, except any property which would otherwise have passed by survivorship to some other person. On the other hand, if a legacy is given in general terms without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator as per Section 104 of the Indian Succession Act. The assent of the executor which is necessary to complete a legatee's title to his legacy to a specific bequest will be sufficient to divest his interest as executor therein and to transfer the subject of the bequest of the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way, as provided by Sections 332 and 333 of the Indian Succession Act. Such assent may be verbal and it may be either express or

implied from the conduct of the executor. The assent of the executor to a legacy gives effect to it from the death of the testator as laid down by Section 336 of the Indian Succession Act.

12. The specific legacy bequeathed by the testator in the present case was of right to occupy and enjoy the rents or profits of the house property. Subject to this right which the legatee could enjoy at any time during her life-time, the right to sell this property was kept with the executors and trustees of the testator. The words "as such" in sub-section (1) of Section 211 of the Indian Succession Act indicate that an executor is not the absolute owner of the property of the deceased but the property only vests in him for the purpose of representation. He holds the property for giving effect to the intention of the testator and an executor has no beneficial interest in the property of the deceased. As soon as he gives assent to a specific bequest, he gets divested of his representative interest in such specific bequest, such as of life interest devised under the Codicil in the house property in question. If the statute requires the assessment of income from such house property to be made to the owner thereof, it cannot be taxed to a person who is in possession, but is not the owner. The owner of the house property is liable for tax although it may be in the possession of some other person. However, in case of executors in whom all the property of the deceased person vests as his legal representative under Section 211 of the Indian Succession Act, the liability to pay the tax is governed by the provisions of Section 168 of the Act and subject to other provisions contained in Section 168, the income of the estate of a deceased person shall be chargeable to tax in the hands of the executor. As provided in sub-section (4) of Section 168, in computing the total income of any previous year, which would include income classified under head "income from house property" under Section 14 of the Act, in the hands of the executors, any income of the estate of that previous year distributed to or applied to the benefit of any specific legatee of the estate of that previous year shall be excluded; but the income so excluded shall be included in the total income of the previous year of such specific legatee. Thus, notwithstanding the fact that the executor is the legal owner of the estate property, the law in a case where any income of the estate of the previous year is distributed to or applied to the benefit of the specific legatee, treats it as income in the hands of the specific legatee. This would mean that where the income from house property is so applied to the specific legatee, he is to be

treated as the beneficial owner of the house property so far that income from the house property is concerned, for the purpose of Section 22 of the Act. Therefore, on a combined effect of Section 22 and Section 168(4) of the said Act, the notional income from the house property, which was not let out, on the basis of its annual value would become taxable in view of the life interest of the nature mentioned in the Codicil having devolved on the widow Smt. Saraladevi Sarabhai as a specific legatee, in her hands, the executors having assented to the title to her legacy which gave effect to the legacy from the death of the testator. The notional income from the house property on the basis of annual value stood applied to the benefit of the widow by the very nature of the legacy which entitled her to life long residence to the exclusion of all others and also to the exclusive right to the rents and profits from the said house property. The income from the house property was not received by or on behalf of or accrued or arisen or deemed to have accrued or arisen to the executors and trustees of the estate under Section 5 of the said Act, since it was applied by virtue of the nature of legacy under the Codicil to the said beneficiary. The Income Tax Officer had therefore, earlier rightly assessed it in the hands of the legatee Smt. Saraladevi Sarabhai as the beneficial owner of the right to reside and receive rental income from the house property during her life. The Tribunal therefore, erred in holding that the action of the ITO of assessing the applicant as owner in respect of the income from the house property was justified. The aforesaid question No.1 arising from R.A. No. 709/1983 for the assessment year 1973-74 is therefore answered in the negative in favour of the assessee and against the Revenue.

13. In view of our finding on the above question, the question No.2 in R.A No. 709/83 referred above, is left unanswered, as it does not survive for our consideration.

The Reference stands answered accordingly. There shall be no order as to costs.

*/Mohandas